

5 MAY 08 2002

*Michael N. Milby, Clerk*

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES  
LITIGATION

This Document Relates To:

MARK NEWBY, *et al.*, Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

-v.-

ENRON CORP., *et al.*,

Defendants.

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, *et al.*, Individually and On Behalf of  
All Others Similarly Situated,

Plaintiffs,

-v.-

KENNETH L. LAY, *et al.*,

Defendants.

**MOTION OF DEFENDANT CITIGROUP, INC.  
TO DISMISS PLAINTIFFS' CONSOLIDATED  
COMPLAINT FOR VIOLATIONS OF SECURITIES LAWS**

TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT  
JUDGE:

Defendant Citigroup, Inc. ("Citigroup") hereby moves, pursuant to Rules  
12(b)(6) and 9(b), Fed. R. Civ. P., to dismiss the claims against it in the Consolidated  
Complaint for Violations of Securities Laws (the "Complaint") on the following grounds:

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## **I. PRELIMINARY STATEMENT**

Plaintiffs have filed numerous purported class action lawsuits against numerous defendants alleging fraud in connection with the purchase or sale of securities issued by Enron Corporation (“Enron”). The Court has consolidated those actions and, by Order dated February 15, 2002, appointed a Lead Plaintiff and Lead Counsel. On April 8, 2002, Lead Counsel for plaintiffs filed the Complaint. The Complaint purports to assert claims against various defendants under the Securities Act of 1933 (the “1933 Act”), the Securities Exchange Act of 1934 (the “1934 Act”), and the Texas Securities Act. As to Citigroup, the Complaint purports to assert claims under Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder, and under Sections 11 and 15 of the 1933 Act.

## **II. GROUNDS FOR DISMISSAL**

The Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and pursuant to Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (the “PSLRA”), 15 U.S.C. §§ 78u-4 *et seq.*, for failure to plead fraud with particularity.

*First*, all of plaintiffs’ claims against Citigroup should be dismissed because they do not satisfy the requirements for pleading a claim of fraud with specificity under the PSLRA and Rule 9(b). The Complaint does not satisfy plaintiffs’ obligation to specify the allegedly fraudulent statements that they attribute to Citigroup, or to explain why those statements are false. Instead, plaintiffs identify hundreds of public statements made about Enron by various defendants and others (including Enron itself) over the course of more than three years, and then broadly allege that “each” of these statements

was false and misleading. Under well-settled law in this Circuit and elsewhere, this blunderbuss approach to pleading does not satisfy either the PSLRA or Rule 9(b).

*Second*, the Complaint also fails to satisfy plaintiffs' burden under the PSLRA to plead facts creating a "strong inference of scienter." The complaint nowhere identifies a single communication showing that Citigroup knew that Enron's reported financials were fraudulent or that Enron's business was a Ponzi scheme. Instead, plaintiffs rely on conclusory allegations that Citigroup somehow learned of the fraud in the course of its regular business as a lender and underwriter. As this Court and many other courts have repeatedly held, such conclusory allegations of scienter are inadequate under the PSLRA and Rule 9(b).

Plaintiffs' failure to allege facts creating the required strong inference of scienter is underscored by the irrationality of the scheme they allege. Plaintiffs allege that Citigroup loaned hundreds of millions of dollars to Enron when it knew that Enron's financial statements were fraudulent and that it was engaged in a Ponzi scheme, solely to allow Citigroup to earn fees from continuing to provide financing and investment banking services to Enron. As the courts have consistently held, such allegations—which presume that Citigroup would commit fraud and expose itself to losses in the hundreds of millions of dollars merely to obtain ordinary professional fees—do not satisfy plaintiffs' burden of pleading facts creating a strong inference of fraudulent intent.

*Third*, plaintiffs' principal claims under Section 10(b) are barred by *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), which holds that no right of action exists for aiding and abetting an alleged violation of Section 10(b). Plaintiffs allege that Citigroup "assisted" Enron's alleged fraud by lending money

to Enron, underwriting certain of its securities, and structuring transactions that Enron subsequently falsely characterized in its financial statements. These allegations, at most, assert a claim for aiding and abetting a violation of Section 10(b) by Enron, and they are accordingly barred as a matter of law under *Central Bank*.

*Fourth*, plaintiffs' claim under Section 11 of the 1933 Act, relating to one security issued by Enron as to which Citigroup was the lead underwriter, is also barred as a matter of law because the only representative plaintiff who purchased the security at issue did so more than two years *after* that security was first issued. Section 11 provides that a plaintiff suing under that statute who acquired the securities more than a year after the securities were first issued must plead *actual reliance* on the alleged misstatements in the prospectus. Plaintiffs have not pleaded reliance here. Nor could they, because the financial information in the prospectus was more than three years old when the representative plaintiff made his purchases, and he did so after numerous negative reports about Enron had become public, including allegations that Enron's financial statements were materially misleading. Plaintiffs' claims under Section 11 also should be dismissed because (i) they sound in fraud, and, for the reasons set forth above, they do not satisfy the burden of pleading fraud with particularity under Fed. R. Civ. P. 9(b); and (ii) the representative plaintiff does not allege that he purchased securities in the public offering, and accordingly his claim under Section 11 is barred by *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

*Finally*, plaintiffs' claims against Citigroup as a "controlling person" under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act should be dismissed because the Complaint does not allege any facts showing that Citigroup is a controlling

person of any other defendant. A claim under Section 15 or Section 20(a) requires allegations of an underlying primary violation, control by the defendant over the controlled person, and particularized facts as to the controlling person's culpable participation in the alleged fraud. The Complaint pleads no facts showing either that Citigroup controlled any other defendant, or (as set forth above) that Citigroup was a culpable participant in any other defendant's alleged wrongdoing.

The particulars as to each basis for dismissal, with supporting authorities, are set forth in the Memorandum of Law of Defendant Citigroup, Inc. in Support of its Motion to Dismiss, filed simultaneously with this motion and incorporated by reference herein for all purposes.

### **III. PRAYER FOR RELIEF**

Wherefore, Defendant Citigroup, Inc. prays that its Motion to Dismiss Plaintiffs' Consolidated Complaint for Violation of the Securities Laws be granted, that Plaintiffs' claims against Citigroup be dismissed, and that the Court grant Citigroup such other and further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was this day forwarded via e-mail, facsimile, or Federal Express overnight delivery to each of the counsel or parties listed on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

Dated: May 8, 2002

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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
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In re ENRON CORPORATION SECURITIES  
LITIGATION

Civil Action No. H-01-3624  
(Consolidated)

This Document Relates To:

MARK NEWBY, *et al.*, Individually and On Behalf  
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Plaintiffs,

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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, *et al.*, Individually and On Behalf of  
All Others Similarly Situated,

Plaintiffs,

-v.-

KENNETH L. LAY, *et al.*,

Defendants.

**[PROPOSED] ORDER**

Pending before the Court is Defendant Citigroup, Inc.'s Motion to Dismiss  
the Consolidated Complaint for Violation of the Securities Laws (#\_\_\_\_).

After considering the parties' respective contentions and the record, the

Court

ORDERS that Defendant Citigroup, Inc.'s Motion to Dismiss is  
GRANTED and that the Consolidated Complaint for Violation of the Securities Laws  
hereby is dismissed against Defendant Citigroup, Inc. in its entirety and with prejudice.

SIGNED at Houston, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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THE HONORABLE MELINDA HARMON  
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was this day forwarded via e-mail, facsimile, or Federal Express overnight delivery to each of the counsel or parties listed on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

Dated: May 8, 2002

By: Eugene B. Wilshire  
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